No. 88-645

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In The

Supreme Court of the United States

October Term, 1988

RON ALVERADO, GORDON C. ARLT, DAVID T. BUSHEY, EDWARD K. BURSLETT, LYNN HAMMIT, DONALD JARRET, IRA C. MARTIN, WILL MATHEWS, MICHAEL B. PARR, ART SCHMIDT AND DAVID E. YORK,

Petitioners,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM AND BECHTEL CONSTRUCTION, INC., AND/OR BECHTEL POWER CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

I. Whether the Washington Supreme Court correctly held that a state court may not apply state law to invalidate a safety regulation promulgated by a federally licensed nuclear power plant operator?

II. Whether the Washington Supreme Court correctly held that the fourth amendment is not violated by preemployment urinalysis screening of applicants for jobs with unrestricted access to a nuclear reactor facility?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The names of the parties to this proceeding are those contained in the caption of this case. Respondents Bechtel Power Corporation and Bechtel Construction, Inc. are wholly owned subsidiaries of Bechtel Group, Inc.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings Below ii

Table of Authorities iv

I. Statement of Facts 2

II. Reasons Why the Petition Should Be Denied ... 6

A. The Washington Court Correctly Held that Federal Law Preempted Petitioners' State Law Claim 6

1. Federal Law Controls Challenges to the Validity of Safety Regulations Promulgated By Nuclear Power Plant Operators 6

2. Petitioners' Challenge to Preemployment Screening Presents a Potential Direct Conflict Between State Law and an NRC Safety Mandate 8

3. Proposed NRC Rules Mandating Preemployment Urinalysis Minimize the Importance of Petitioners' Preemption Argument 9

B. The Washington Court Correctly Held that Preemployment Urinalysis Screening of Applicants for Jobs at the Nuclear Reactor Does Not Violate the Fourth Amendment .. 10

The Washington Supreme Court's Decision is Consistent With All of the Circuit Cases that Have Analyzed Drug Testing in the Employment Context 10

III. Conclusion 14

TABLE OF AUTHORITIES

Page

CASES

Alverado v. WPPSS, 111 Wn.2d 424, 759 P.2d 427 (1988) 5, 6, 12

Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704 (1988) 7

Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988) 12

Pacific Gas and Electric Co. v. State Energy Resource Conservation and Development Commission, 461 U.S. 190 (1983) 6, 7, 8

Policemen's Benevolent Association v. Township of Washington, 850 F.2d 133 (3d Cir. 1988) 11

Railway Labor Executives' Association v. Burnley, 839 F.2d 575 (9th Cir.), *cert. granted* 108 S. Ct. 2033 (1988) 11

Rushton v. Nebraska Public Power District, 844 F.2d 562 (8th Cir. 1988) 9, 10, 12

Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) 11

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) .. 7, 8

Treasury Employees v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988) 11

STATUTES

42 U.S.C. §§ 2011 *et seq.* 4

TABLE OF AUTHORITIES–Continued

Page

OTHER AUTHORITIES

51 Fed. Reg. 27,921 (1986) 3

53 Fed. Reg. 37,695 (1988) (to be codified at 10 C.F.R. pt. 26) (proposed September 22, 1988) 9

Note, *A Proposal for Mandatory Drug Testing of Federal Civilian Employees*, 62 N.Y.U. L. Rev. 322 (1987) 13

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Respondents Washington Public Power Supply System and Bechtel Construction, Inc., by and through their counsel of record, respectfully present this Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of Washington.

I.

STATEMENT OF FACTS

Petitioners are applicants and potential applicants for employment with respondent Bechtel Construction, Inc. ("Bechtel"), a construction and maintenance contractor at respondent Washington Public Power Supply System's ("Supply System") Washington Nuclear Project ("WNP-2").[1] The Supply System, a joint operating agency and municipal corporation, operates the WNP-2 nuclear reactor under an operating license granted by the Nuclear Regulatory Commission ("NRC").

Petitioners filed suit in the Superior Court for Benton County, Washington, seeking to permanently enjoin the Supply System's Fitness for Duty ("FFD") Program. Part of the FFD Program mandates preemployment urinalysis screening of two critical classes of WNP-2 job applicants: (1) applicants for long-term employment (longer than thirty days); and (2) applicants for positions with unrestricted access to the nuclear reactor. Petitioners contended that the preemployment urinalysis violated their right to privacy under article I, section 7 of the Washington State Constitution.

The Supply System developed the FFD Program in response to an NRC policy statement entitled "Statement

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[1] Petitioners are all members of Plumbers and Steamfitters Local 598. Bechtel hires members of this union to perform maintenance and modifications of critical components of WNP-2, including the Reactor Cooling System, Emergency Core Cooling System, Reactor Pressure Vessel Piping and the Radiation Waste System.

on Fitness for Duty of Nuclear Power Plant Personnel." *See* 51 Fed. Reg. 27,921 (1986) (the "1986 Policy Statement"). In this policy statement, the NRC imposed three requirements on nuclear power plant operators: (1) a requirement that the operators prohibit the sale, use and possession of drugs and alcohol within nuclear power plant protected areas; (2) a requirement that all persons granted unrestricted access to the nuclear power plant be "fit for duty" -- free from the influence of drugs and alcohol; and (3) a requirement that nuclear power plant operators establish "[e]ffective monitoring and testing procedures to provide reasonable assurance that nuclear power plant personnel with access to vital areas are fit for duty." *Id.* at 27,922.

The Supply System designed the FFD Program in consultation with industry representatives, employees, and experts in pharmacology and security. The Program includes specific procedural safeguards to ensure the accuracy of the tests and to protect the workers' privacy. The goal of the Program is to ensure that workers granted access to the reactor will perform their jobs safely and effectively. The Supply System denies applicants access to the nuclear reactor if they test positive for substance abuse; there are no other punitive measures in the policy. An applicant who fails the urinalysis may not be employed at the WNP-2 site for at least ninety days, and upon reapplication must establish his or her fitness for duty.

The Supply System, like all nuclear power plant operators, historically has conducted intensive background screening of all job applicants. These screening

procedures are designed to improve the safety and security of the nuclear facility. In addition to urinalysis, all applicants at WNP-2 undergo intensive background investigations to prevent the hiring of workers with psychological dysfunctions, financial problems or criminal records. Petitioners have not challenged these other employee screening devices.

The urinalysis screening is a simple and discreet procedure. Samples are collected in a medical facility by medical personnel. The samples are then sent to two different laboratories, where they are analyzed under two different methodologies. Each sample is tested in four separate tests, *all* of which must indicate the presence of prohibited substances before an applicant will be denied access to the nuclear facility.

The Supply System carefully conceived and narrowly tailored the FFD Program to limit the intrusion on applicants' privacy. The Program contains detailed procedural protections. The Program addresses the compelling governmental interest of nuclear safety. Given these facts, the trial court held that the FFD Program did not violate the petitioners' right to privacy under article 1, section 7 of the Washington Constitution.

The Washington State Supreme Court modified the trial court's decision by finding that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* (1982), preempted petitioners' state law challenge to a safety regulation promulgated by a federally licensed nuclear power plant operator. Accordingly, the court analyzed the FFD testing

under the fourth amendment of the United States Constitution.

Applying the administrative search exception to the fourth amendment warrant requirement, the Washington court found that preemployment urinalysis screening was constitutional in the context of the highly dangerous and heavily regulated nuclear power industry. *Alverado v. WPPSS*, 111 Wn.2d 424, 759 P.2d 427 (1988). The court unanimously held:

> [T]he "substantial government interest" at stake in this program is to ensure that personnel in vital areas of a nuclear power facility are fit for duty in one of the most sensitive and demanding industries in our economy; the public safety concerns are overwhelming. . . .
>
> [T]he warrantless inspections are necessary in this instance to further these public safety interests. Responsibilities of employees in vital areas of a nuclear power facility are of such a nature that any drug related impairment could have very serious consequences for the general public. Because of the government's overriding interest in preventing any drug-impaired employee from working in one of these vital areas, and the difficulty in determining by mere visual observation whether a prospective employee suffers from such impairment, routine drug testing in the context of preemployment screening is virtually the only way in which the operators of the WPPSS facility can effectively monitor compliance.

Alverado, 111 Wn.2d at 440.

II.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THE WASHINGTON COURT CORRECTLY HELD THAT FEDERAL LAW PREEMPTS PETITIONERS' STATE LAW CLAIM

1. Federal Law Controls Challenges to the Validity of Safety Regulations Promulgated by Nuclear Power Plant Operators

The Washington Supreme Court held that federal law controls direct challenges to the validity of nuclear safety regulations. *Alverado v. WPPSS*, 111 Wn.2d 424, 431, 759 P.2d 427 (1988) (citing *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983)). Since the FFD Program clearly promotes safety at the nuclear reactor, petitioners' state law challenge was preempted by federal law.

The Washington Supreme Court and the trial court both found the NRC policy statement (and the FFD Program itself) to be directly related to nuclear safety. Also, both courts found that the Supply System and Bechtel could comply with NRC policy only by conducting pre-employment drug tests on all applicants for jobs with unrestricted access to the nuclear reactor. Accordingly, the issue presented by the petition is whether state law may interfere with a nuclear power plant safety regulation promulgated by the plant operator in accordance with NRC policy.

Petitioners cite cases in which this Court held that states are not prohibited from regulating certain aspects

of nuclear power generation.[2] All of these cases are distinguishable. First, petitioners are attempting to invalidate a nuclear safety regulation on state law grounds. None of the cited cases analyzed a direct challenge to a safety regulation, but instead discussed whether state law was preempted because of its *potential* or *indirect* effects on safety at nuclear power facilities.[3] Second, petitioners' attempt to apply state law to the Supply System's FFD Program could arguably increase the risk of an accident at WNP-2. In contrast, the cases cited by petitioners all involved state laws that indirectly imposed *more stringent* safety requirements on nuclear facilities.

Petitioners contend that state courts may apply state law to invalidate safety procedures adopted by a federally licensed nuclear power plant operator as long as the

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[2] Petitioners rely on *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); and *Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704 (1988).

[3] In *Pacific Gas*, the state statute at issue required the state energy commissioner to establish a means for disposing of nuclear waste before certifying the construction of new plants. In *Silkwood*, the Court analyzed an Oklahoma statute that authorized punitive damages for injuries caused by the escape of plutonium from a nuclear facility. *Goodyear* analyzed the application of the Ohio workers' compensation statute to employees at a nuclear facility. *Goodyear* did not involve the Atomic Energy Act, nor did it apply the preemption analysis utilized in *Silkwood* and *Pacific Gas*. None of these cases considered a direct challenge to a nuclear safety regulation.

state law was not enacted for the purpose of regulating nuclear safety. Taken to its logical conclusion, petitioners' argument would permit states to pass, for example, laws encouraging the development of cheap electrical power and on that basis invalidate safety regulations promulgated by nuclear power plant operators. The only limit on the state's authority would be the presence of a specific statute or NRC regulation setting forth detailed safety procedures. Under petitioners' view, state courts are free to second-guess the expertise of nuclear power plant operators and invalidate the operators' attempts to implement NRC policies as long as there are no detailed NRC regulations in place. This is plainly contrary to the policy set forth in the Atomic Energy Act and described by this Court in *Pacific Gas*.

2. Petitioners' Challenge to Preemployment Screening Presents a Potential Direct Conflict Between State Law and an NRC Safety Mandate

Even if Congress has not entirely displaced state law in a given field, state law is still preempted if an "actual conflict" exists between state and federal law. Such conflict occurs when

> it is impossible to comply with both state and federal law . . . or state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citations omitted).

The trial court found as a matter of fact that preemployment urinalysis of job applicants is the only means by which Bechtel and the Supply System can

comply with the NRC policy statement requiring a drug-free work force at nuclear reactors. *Cf. Rushton v. Nebraska Public Power District*, 844 F.2d 562, 566 (8th Cir. 1988) (finding that a similar FFD Program "is the least restrictive method of assuring the safe operation of the [nuclear] power plant.") This finding of fact highlights the potential conflict between the NRC's 1986 Policy Statement and state law. If the state court were to invalidate the FFD plan on state law grounds, Washington law would directly interfere with the federal goal of nuclear safety.

3. Proposed NRC Rules Mandating Preemployment Urinalysis Minimize the Importance of Petitioners' Preemption Argument

Shortly after the Washington Supreme Court ruled in this case, the NRC published proposed rules mandating random drug testing of nuclear power plant job applicants and employees. *See* 53 Fed. Reg. 37,695 (1988) (to be codified at 10 C.F.R. pt. 26) (proposed September 22, 1988). When the NRC finalizes this proposed rule, there will be detailed federal regulations in place and an even clearer potential conflict between state and federal law. The preemption questions raised by petitioners will not recur. Accordingly, the petition does not present an issue of significant importance to this Court and should be denied.

B. THE WASHINGTON COURT CORRECTLY HELD THAT PREEMPLOYMENT URINALYSIS SCREENING OF APPLICANTS FOR JOBS AT THE NUCLEAR REACTOR DOES NOT VIOLATE THE FOURTH AMENDMENT

The Washington Supreme Court's Decision Is Consistent With All of the Circuit Cases That Have Analyzed Drug Testing In the Employment Context

Petitioners' erroneous contention that this Court should grant review springs from their failure to acknowledge the unique facts presented by this case. The Supply System instituted the FFD Program in the context of the heavily regulated nuclear power industry. Moreover, the FFD testing serves a compelling state interest -- assuring nuclear safety. By failing to take these special considerations into account, petitioners have attempted to create a conflict between the Washington court's decision and decisions of other courts that have analyzed the constitutionality of drug testing. No such conflict exists. All of the cases cited by petitioners either explicitly or implicitly support the result reached by the Washington Supreme Court.

The Washington court's decision is consistent with the only other case directly on point. *See Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (upholding random drug testing of nuclear power plant

employees). The decision is also consistent with decisions in the Third Circuit[4] and the Fifth Circuit.[5]

Contrary to petitioners' contention, the Washington court's decision does not conflict with the Ninth Circuit's opinion in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988). In *Burnley*, the court declined to apply the administrative search exception to warrantless drug testing of railroad employees because they were not a "principal regulatory concern" in the railroad industry. *Id.* at 585 (distinguishing *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986)).

In contrast to workers in the railroad industry, employees in the nuclear power industry are quite clearly a matter of "principal regulatory concern." The Washington Supreme Court highlighted this factual distinction:

> Like the jockeys [in *Shoemaker*] but unlike the railroad employees [in *Burnley*], the workers at WNP 2 are subject to intensive background investigations which include credit checks, criminal records, medical and psychological evaluations; like the horseracing industry but unlike the railway industry, the regulatory agency with oversight of the nuclear power

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[4] *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) *cert. denied*, 479 U.S. 986 (1986) (random drug testing of jockeys allowed in context of highly regulated horse racing industry); *Policemen's Benevolent Association v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (drug testing permitted in the context of highly regulated police profession).

[5] *See Treasury Employees v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988) (permitting drug testing of applicants for sensitive positions in the Customs Service).

> industry has the authority to establish the qualifications for employees; like the jockeys but unlike railroad employees, workers in the nuclear power industry are a "principal regulatory concern."

Alverado, 111 Wn.2d at 439.

As the Washington court recognized, the *Burnley* decision did not preclude the use of drug testing in special contexts. The nuclear power industry is one such special context. The nature of the industry presents unique facts that render the FFD Program constitutional.

Other courts have recognized the special nature of the nuclear power industry despite overturning drug testing in less compelling circumstances. *See, e.g., Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988) (enjoining random drug tests of city firefighters). In *Lovvorn*, the court recognized the state interest in nuclear safety:

> [I]t would appear that the likelihood of enormous losses being imposed on society because of an impaired firefighter is significantly lower than with impaired air traffic controllers and nuclear plant employees who literally hold thousands of lives in their hands every day.
>
> . . . .
>
> In *Rushton v. Neb. Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988), the court there also recognized, in upholding the mandatory testing of nuclear plant employees, that in certain circumstances the state's interest may be so great that individualized suspicion will not be required.
>
> In the case of the mandatory drug testing program at issue here, we believe that, while firefighters may at times be in the position where significant losses could be imposed on society because of drug

> impairment, it is clearly not of the same magnitude as exists with air traffic controllers or nuclear power plant operators, for example.

Id. at 1547.[6]

The Washington court's decision is consistent with all of the circuit opinions that have analyzed drug testing of employees. The Washington court properly recognized the unique context in which petitioners will work and in which the drug testing takes place. These special facts include the necessarily intrusive background checks, psychological screenings, and criminal investigations to which applicants for jobs at the Supply System are subject, the intensive regulation of the industry (particularly its safety aspects), and the compelling state interest in nuclear safety. The Washington court's ultimate conclusion is correct under any analysis. Accordingly, there is no basis for granting the petition.

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[6] Commentators have also recognized the special nature of drug testing in the nuclear power industry. *See, e.g.*, Note, *A Proposal for Mandatory Drug Testing of Federal Civilian Employees*, 62 N.Y.U.L. Rev. 322, 365-70 (1987) (proposing that random testing be limited to employees with "ultra-sensitive positions," such as employees of nuclear power plants).

III.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request this Court to deny the Petition for a Writ of Certiorari to the Washington State Supreme Court.

DATED this 11th day of November, 1988.

RESPECTFULLY SUBMITTED,

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